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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELDON K. McDANIEL, DARLENE MOORE, KARL SANNICKS, and ROBERT HUME,

Petitioners,

v.

LESTER TELLIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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96 pp

QUESTIONS PRESENTED

I. WHETHER NEVADA REVISED STATUTE § 209.241 CREATES A LIBERTY OR PROPERTY INTEREST FOR EACH INMATE IN THE INTEREST ACTUALLY EARNED ON MONEY DEPOSITED IN THE PRISONERS' PERSONAL PROPERTY FUND.

II. WHETHER THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF "PRISONERS' PERSONAL PROPERTY FUND" BY FINDING THE STATUTE CREATED A PROTECTED PROPERTY INTEREST.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*The named petitioners have succeeded S. Godinez and Ron Angelone, respondents-appellees below, in office. The named petitioners are substituted as parties to this action in accordance with Supreme Court Rule 35(3).

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW ELDON K. MCDANIEL, DARLENE MOORE, KARL SANNICKS, ROBERT HUME[1], and

[1]Petitioner McDaniel, successor in office to S. Godinez; Petitioner Sannicks, successor in office to Ron Angelone, have been substituted as parties. See Sup. Ct. R. 35(3). Lester Tellis, respondent in this Court, and petitioner-appellant below, will be referred to as Tellis.

Frankie Sue Del Papa, the Attorney General of the State of Nevada, and file this petition for writ of certiorari seeking to vacate the Order, on Remand, of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Order of the United States District Court, District of Nevada, directing both parties to rebrief certain issues, was entered on January 30, 1991. This order is reproduced in Appendix A.

The Judgment of the United States District Court, District of Nevada, which granted the defendants' Cross-Motion for Summary Judgment, was entered on April 2, 1991. This Judgment is reproduced in Appendix B.

The Order of the United States District Court, District of Nevada, which denied the plaintiff's Motion for Additional Findings of Fact and to amend accordingly and Plaintiff's Motion for

Partial Summary Judgment was entered on August 8, 1991. This Order is reproduced in Appendix C.

The Opinion from the Ninth Circuit Court of Appeals, which reversed the decision of the United State District Court, District of Nevada, was filed September 28, 1993. This Opinion is reproduced in Appendix D.

The Order from the Ninth Circuit Court of Appeals, which denied the defendants' Petition for Rehearing, was filed on February 22, 1994. This Order is reproduced in Appendix E.

JURISDICTIONAL STATEMENT

This case arises from a civil rights action filed on July 29, 1990, in the federal district court by Lester Tellis, an inmate incarcerated in the Nevada Department of Prisons. The complaint alleged violations of his First, Fourth,

. . .

Fifth, Sixth, Ninth and Fourteenth Amendment Rights.

Defendants filed an Answer on September 24, 1990.

Plaintiff filed a Motion for Partial Summary Judgment on November 21, 1990.

Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and a Cross-Motion for Summary Judgment and Plaintiff's Reply were filed on November 23, 1990.

The United States District Court, District of Nevada, entered an Order on January 30, 1991 directing both parties to rebrief certain issues.

Defendants filed a Supplemental Brief in Aid of Cross-Motion For Summary Judgment on March 25, 1991.

The United States District Court, District of Nevada entered Judgment granting the Defendants' Cross-Motion for Summary Judgment on April 2, 1991.

Plaintiff filed his Reply to Defendant's Supplemental Brief in Aid of Cross-Motion for Summary Judgment on April 10, 1991.

Plaintiff filed a Motion for Additional Findings of Fact on April 18, 1991.

Defendants filed an Opposition to Motion for Additional Findings of Fact on May 13, 1991.

The United States District Court District of Nevada entered an Order denying Plaintiff's Motion for Additional Findings of Fact and Plaintiff's Motion for Partial Summary Judgment.

Plaintiff filed his Informal Brief appealing the Order of the United States District Court on October 11, 1991.

Defendants filed an Answering Brief on February 3, 1992.

The United States Court of Appeals for the Ninth Circuit filed its decision

reversing the District Court's decision on September 28, 1993.

Defendants filed a Petition for Rehearing and Suggestion for Rehearing En Banc on October 12, 1993.

The United States Court of Appeals for the Ninth Circuit filed an Order denying the Petition for Rehearing and rejecting the Suggestion for Rehearing En Banc on February 22, 1994. (Judge Farris on the three-judge panel would have granted the petition.) The jurisdiction of this Court is invoked under section 1254(1) of Title 28 to the United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and Constitutional provisions are involved in this case:

Nevada Revised Statute § 209.241.

The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Respondent Lester Tellis, an inmate at Ely State Prison, filed a civil rights complaint on July 29, 1990 alleging a denial of his First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendment rights under the U.S. Constitution. His allegations stemmed from not receiving interest on his inmate account. Tellis requested both damages and injunctive relief.

The issue presented by Tellis was whether an inmate had a constitutional right to interest earned on what he termed his "prisoner's personal property fund."

The United States District Court, District of Nevada after requesting rebriefing by the parties, entered an order on January 30, 1991 granting Defendants' Motion for Summary Judgment.

. . .

The Order stated:

> The Fourteenth Amendment to the United States Constitution states, in relevant part, no state may "deprive any person of life, liberty or property, without due process of law. This right to due process only attaches when a person is deprived of an interest independently recognized as "protected" under state, federal, or constitutional law, Olim v. Wakinekona, 461 U.S. 238 (1983).
>
> Tellis does allege that the state is depositing the interest earned on his money into the prisoners personal property fund generally, rather than into his own account. The defendants do not dispute this and cite Nevada Revised Statutes § 209.241 as authority for this procedure.

Nev. Rev. Stat. 209.241 provides, in pertinent part:

> 1. The director may accept money, including the net amount of any wages earned during the incarceration of an offender after any deductions made by the director, and valuables belonging to an offender at the time of his incarceration or afterward received by gift, inheritance or the like, or earned during the incarceration of the offender and shall deposit the money in the prisoners' personal property fund, which is hereby created as a trust fund.

2. The director:

(a) Shall keep or cause to be kept, a full and accurate account of the money and valuables, and shall submit reports to the board relating to the money and valuables as may be required from time to time.

(b) May permit withdrawals for immediate expenditure by an offender for personal needs.

(c) Shall pay over to each offender upon his release any remaining balance in his individual account.

3. The interest and income earned on the money in the fund, after deducting any applicable charges must be credited to the fund. [Emphasis added.]

The District Court in its order stated: "The question presented here is whether the words "the fund" in sub-section 3 of this statute (which has not been interpreted by the Nevada courts) refer to a prisoner's individual account within the prisoners' personal property fund, or to the fund as a whole."

The District Court entered Judgment on April 24, 1991, granting the Defendant's Cross-motion for Summary Judgment,

holding that Tellis did not have a constitutional right to interest earned on his individual account and that the "fund" refers to the prisoners' personal property fund as a whole.

The Ninth Circuit Court of Appeal reversed the District Court, stating that the mandatory language of Nevada Revised Statute 209.241 creates a protected property interest in the interest on each inmate account. Defendants filed a Petition for Rehearing and Suggestion for Rehearing En Banc on October 12, 1993, which was denied by an order filed February 22, 1994 by the Ninth Circuit.

The issues on appeal are:

I. Whether Nevada Revised Statute 209.241 Creates a Liberty or Property Interest For Each Inmate in the Interest Actually Earned on Money Deposited in the Prisoner's Personal Property Fund, and

. . .

II. Whether the Ninth Circuit Erred in its Interpretation of "Prisoners' Personal Property Fund" by Finding the Statute Created a Protected Property Interest.

SUMMARY OF THE ARGUMENT

Two of the three judges on the Ninth Circuit's three judge panel misinterpreted Nevada Revised Statute 209.241 in finding that the phrase "prisoners' personal property fund" created a protected property interest for each inmate in his individual inmate account. The Court erred by failing to discern syntax, the impact on the prison system, and legislative intent and acquiescence. The Ninth Circuit should have certified the question of interpretation of a state statute to the Nevada State Supreme Court. Finally, the case law is clear there is no

. . .

constitutional right of inmates to interest from inmate trust funds.

1. The Syntax of the Statutes Plainly Refers to the Prisoners' Fund, a Single Fund Established for the Benefit of Prisoners as a Collective Unit.

As a fundamental point, the syntax of the term prisoners' personal property fund must be addressed. The difficulty the Ninth Circuit encountered apparently arose from the meaning of "prisoners' personal property fund" and whether that phrase refers to a prisoner's individual account or to the fund as a whole. To begin with, the word "prisoners'" is a plural possessive which indicates on its face an inclusion of **all** inmates, not just one. Further, the word "fund" clearly refers to **one** collective fund, not to many individual accounts. Applying traditional statutory analysis and looking at the plain meaning of the

statute, the phrase "prisoners' personal property fund" cannot logically be interpreted to mean anything other than one collective fund for all prisoners, not each prisoner's individual account.

The prisoners' personal property fund, as one collective fund, under the plain language of the statute, earns interest which is to be credited to that collective fund as a whole, and not to each prisoner's individual account. Nowhere does Nev. Rev. Stat. 209.241 require the director to keep an account of the interest earned on the money in the fund for each inmate and credit the interest to individual inmate accounts.

The language of Nev. Rev. Stat. 356.087 is further evidence that interest must be credited to the "fund" as a whole:

> 1. Except as provided in subsections 2, 3 and 4 or in a specific statute, all interest paid on money belonging to this state

must be deposited in the state general fund.

2. Interest earned and received on any gift or bequest to an agency of the state must be credited to the agency unless the gift or bequest provides otherwise. an agency, when depositing a gift or bequest, shall notify the state treasurer whether it is a gift or bequest which entitles the agency to the interest earned.

3. For each fund or account which by specific statute is credited with the interest earned on money deposited in **it**, the state treasurer shall determine the proportionate share of interest and income earned by it and credit that amount to it. [Emphasis added.]

It is clear that the term "it" refers to the fund and not individual inmates.

Notwithstanding the above, there is no plain language in the statute upon which any inmate could arguably rely as creating a protected property interest. If the statute provided that all interest shall be credited to each individual inmate account, then such an argument could be made. However, such language does not exist in the statute. In order

to create a protected liberty or property interest, a state regulation must contain substantive predicates, and if the predicates are found to exist, then the regulation must provide for a particular or mandatory outcome to follow. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 462 (1989). However, the mandatory outcome must be created by "unmistakably mandatory language" contained in the regulation. Hewitt v. Helms, 459 U.S. 460, 471-462 (1983). There is no explicit, unmistakable mandatory language in the Nevada statutes creating a protected property interest for each inmate on the interest earned on the fund referred to in the statute. The opposite is true, and is demonstrated by these factors:

(1) The district court's interpretation of the statute was the opposite of the Ninth Circuit's

interpretation. If indeed the language of the statute was explicit and unmistakable, the two courts would hardly have come to different conclusions;

(2) The legislature has continued to approve, every two years when it meets, the budget for the Nevada Department of Prisons, which is based upon the interest in the inmate accounts being credited to a collective fund, from which it is intended the proceeds to benefit all inmates by funding law libraries and recreational equipment.

2. The Legislature has Acquiesced in the Department of Prisons' Interpretation of the Statute.

The legislature consistently has acquiesced in the interpretation and construction of Nev. Rev. Stat. 209.241 by the Director of the Nevada Department of Prisons. Since 1981, when the statutory language relevant to interest

of the offenders' earnings was incorporated into the statute, the interest earned on prisoners' personal property accounts has been credited to a "general welfare fund" to support law libraries and purchase recreational equipment for use by the inmates. The legislature has continued to approve the budget for the Nevada Department of Prisons, which has always been based upon applying all earned interest to the prisoner's collective fund.

The district court determined that such a policy is reasonable, benefits the inmates, and has not been modified by the legislature in all the years since it was implemented. (CR 17, p. 5).

When application of federal law depends on an interpretation of state law and no extraordinary circumstances exist, a federal court should defer to the rulings of the state's highest court.

Gentry v. MacDougall, 685 F.2d 322, 323 (9th Cir. 1982). The Nevada Supreme Court in Bing Const. Co. of Nevada v. Nevada Dept. of Taxation, 109 Nev. 275, 849 P.2d 302 (1993), stated "the Legislature's acquiescence in an agency's reasonable interpretation indicates that the interpretation is consistent with legislative intent." Id. at 305 (citing State ex rel. Tax Comm'n v. Safeway, 99 Nev. 626, 668 P.2d 291 (1983)). The Nevada Supreme Court, in Hughes Properties v. State of Nevada, 100 Nev. 295, 680 P.2d 970 (1984), stated "Where, as here, the legislature has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent." Id. at 972 (citing Summa Corp. v. State Gaming Control Board, 98 Nev. 390, 392,

649 P.2d 1363 (1982)). The Nevada Legislature has had ample time to amend Nev. Rev. Stat. 209.241, and has chosen not to do so.

The issue of interest earned on the prisoners' personal property fund being used for the benefit of all inmates, rather than being credited to the individual inmate accounts, was specifically addressed by the legislature in 1983 and 1989. If the legislature had wanted the interest credited to individual inmate's accounts, it could have amended Nev. Rev. Stat. 209.241 to reflect such a requirement. But the legislature chose not to do so, and thus it has clearly acquiesced in the Nevada Department of Prisons' interpretation of the statute, and Plaintiff cannot have developed any expectation that the interest earned on the money in the fund . . .

would be remitted to his individual account.

The Nevada Department of Prisons has never submitted a budget to the legislature which credits interest to individual inmate accounts, nor has the legislature ever approved a budget that would credit interest to inmates. The fact that the legislature has never intended that interest be credited to individual inmate accounts is evidenced by the biennial legislative approval of the individual trust fund budget accounts presented to it. These accounts reflect that all interest is deposited to the inmate welfare account for the benefit of all inmates. If Nev. Rev. Stat. 209.241 required that interest be credited to individual inmate accounts, the legislative auditor would have found the Nevada Department of Prisons to be out of compliance with the statute.

The legislative history of Nev. Rev. Stat. 209.241 indicates that the legislature did not intend for interest earned from the fund to be credited to individual inmate accounts, but rather is to be used for the benefit of all inmates.

Nev. Rev. Stat. 209.241 is not ambiguous. It is clear any interest should be credited to the fund and not to an individual inmate. This is even more obvious when read in conjunction with Nev. Rev. Stat. 356.087. When either of two interpretations can be reasonably drawn from the language of a statute, then the statute is ambiguous and the plain meaning rule has no application. Ambiguous statutes should be construed in line with what both reason and public policy indicate the legislature intended. Hotel Employees and Restaurant Employees Int'l Union v. State ex rel. Nevada

Gaming Control Bd., 103 Nev. 588, 591, 747 P.2d 878 (1987). Ambiguous words should be given the meaning generally ascribed to them in the community. State v. Webster, 102 Nev. 450, 453, 726 P.2d 831 (1986). An ambiguous statute should be construed in line with reason, public policy, and legislative intent. Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957 (1983). Where the meaning of a statute is doubtful a court should consider the effect or consequences. Nevada Tax Comm'n. v. Bernhard, 100 Nev. 348, 351, 683 P.2d 21 (1984).

In Las Vegas Sun v. District Court, 104 Nev. 508, 761 P.2d 849 (1988), The Nevada Supreme Court held that statutes should be interpreted so as to effect the intent of the legislature in enacting them; the interpretation should be reasonable and avoid absurd results. Las Vegas Sun v. District Court 104 Nev. 508,

511 (1988) citing for authority Cragun v. Nevada Pub. Employees' Ret. Bd., 92 Nev. 202, 547 P.2d 1356 (1976). In SIIS v. Jesch, 101 Nev. 690, 709 P.2d 172 (1985), The Nevada Supreme Court liberally construed a statute to protect workers and families rather than to interpret the statute narrowly and preclude the compensation in all claims of asbestos-related cancers. The court in Jesch held "statutory interpretation should not yield an unreasonable result if a more reasonable result is available." SIIS v. Jesch, 101 Nev 690, 694 (1985) citing for authority Sheriff v. Smith, 91 Nev. 729, 733, 542 P.2d 440, 443 (1975). See also Breen v. Caesars Palace, 102 Nev. 79, 715 P.2d 1070 (1986) where the court held "We will not construe a statute to produce an unreasonable result when another interpretation will produce a reasonable result." Breen v. Caesars Palace, 102

Nev. 79, 80 (1986) citing for authority Alper v. State ex rel. Dep't of Hwys., 96 Nev. 925, 930, 621 P.2d 492 (1980).

Mandating the Nevada Department of Prisons to pay interest to every inmate individually is an interpretation which would lead to an unreasonable, absurd and unintended result. The cost to implement the Ninth Circuit Court's order would cost more than the benefits achieved. The Nevada Supreme Court has held that statutes are not to be construed in a manner which will bring about an unreasonable result, or a result contrary to the legislature's purpose. NL Industries v. Eisenman Chemical Co., 98 Nev. 253, 645 P.2d 976 (1982) citing for authority Thomas v. State, 88 Nev. 382, 498 P.2d 1314 (1972).

3. The Impact on The Prison System of Paying Interest on Individual Inmate

. . .

Trust Accounts Would be Burdensome and Costly.

The practicality of the district courts' interpretation, as compared to the devastating consequences of the Ninth Circuit's analysis, cannot be overemphasized or ignored. The United States Supreme Court held in Turner v. Safley, 482 U.S. 76, 107 S.Ct. 2254 (1987), that "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Turner v. Safley, 482 U.S. 76, 89 (1987).

If the Nevada Department of Prisons were to be required to pay interest on each individual inmate account within the Prisoners' Property Fund, the entire Nevada Department of Prison fiscal system would have to be reorganized at great expense to the state.

The following is a cursory explanation of the system as it is organized to date and the costs and procedures which would be required to implement the mandates of the Ninth Circuit Court's order.

The interest distributed by the Treasurer from the Personal Property Fund to the Inmate Welfare Account within the same fund is not solely interest earned on inmates' deposits. It actually is composed of interest earned from all inmate accounts (NRS 209.241), a Division of Forestry (NDF) Account (NRS 209.231) and funds in the Inmate Welfare Account (IWA), which includes funds obtained from the Offender's Store Fund, a fund separate from the Prisoners' Property Fund (NRS 209.221).

In order to pay each inmate a share of interest earned on each individual account, the Department of Prisons would not only have to separate the earnings

for over 7,350 inmate accounts (which are constantly changing as inmates enter or leave the prison system), but also the interest earned for each inmate from the NDF fund and the IWA fund.

Arguably, the Nevada Department of Prisons could establish separate outside bank accounts for all these transactions and for each inmate; however, the State Treasurer's Office does not permit this. This alternative would also be very time-consuming and complicated, and would essentially transform the Nevada Department of Prisons into a bank. The Nevada Department of Prisons could also find itself subject to state and federal banking regulations. The current average weekly balance of all inmate accounts in the fund is approximately $615,802. The average weekly inmate account balance based on that amount for 7,350 inmates is $84. The average monthly interest earned

per account, based on the Treasurer's last quarterly earning of 4.75% annually would be $0.33 (33 cents). Total interest per year for all accounts would be approximately $29,326.50.

It is estimated the cost of the software programming to enable the Nevada Department of Prisons to distribute interest and reconcile accounts would be approximately $32,000 to $40,000, plus $3,600 every year for program maintenance charges. Two staff positions would be required to manage the accounts, which would cost approximately $83,992 per year.

Interest earned on the total Prisoners' Property Fund (which includes NDF and Store interest) was $55,708 in fiscal year 1993. Estimated interest earned on inmate accounts only was $29,326.50. The cost to distribute and manage the interest payments would be

greater than the interest earned by the inmate accounts. Even if the inmates were charged fees to manage the banking accounts, the state would still lose money. The inmates would lose $29,326.50 per year to support their law libraries, to purchase recreational items, and to purchase other items for the benefit of all inmates.

Another problem which the Ninth Circuit failed to address is whether the Nevada Department of Prisons would be required to pay, retroactively, interest to inmates. The interest transferred to the inmates' fund in prior quarters and years has already been disbursed. It would be virtually impossible to figure out past inmate daily account balances, with subtractions for NDF and Store Fund disbursements to IWA.

In addition, the Nevada Department of Prisons would be required to issue a Form

1099 to the IRS for each prisoner receiving interest from the Treasurer.

4. The Ninth Circuit Court Should Have Abstained from Interpreting the State Statute Adverse to the State's Interests and Certified the Question to the Nevada State Supreme Court.

If the Court of Appeals was unable to uphold the district court's granting summary judgment in favor of Defendants on the issue of interest as discussed herein, then it is respectfully submitted the Ninth Circuit should have certified the issue to the Nevada State Supreme Court on the matter of interpretation of its own state statute. The Ninth Circuit has certified questions regarding interpretation of a state's law to a state's supreme court. See e.g., Hansen v. White, 947 F.2d 1378, 1379 (9th Cir. 1991). This Court may wish to abstain and certify the question presented under

the doctrine of abstention as set forth in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941). "[A]bstention protects state sovereignty over matters of local concern, out of considerations of federalism, and out of 'scrupulous regard for the rightful independence of state governments.'" Almodovar v. Reiner, 832 F.2d 1138, 1140 (9th Cir. 1987) (quoting Pullman, 312 U. S. at 501). A court which abstains in an effort to avoid unnecessary constitutional adjudication is "seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures." Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1983).

"Abstention is appropriate where an unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part

the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" Bellotti v. Baird, 428 U.S. 132, 147 (1976) (quoting Harrison v. NAACP, 360 U.S. 167, 177 (1959)). It is a state court which can authoritatively interpret its own state authorities and ordinances. United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971). When the application of federal law depends on an interpretation of state law and no extraordinary circumstances exist, a federal court should defer to the ruling of the state's highest court on the issue. Gentry v. MacDougall, 685 F.2d 322, 323 (9th Cir. 1982).

A case must meet three requirements in order for the court to abstain: first, the case must involve a sensitive issue of social policy which federal courts ought not to enter absent the lack of an

alternative; second, a definitive ruling by the state court would avoid the constitutional question; and third, the issue of state law must be doubtful. C.Y. Development Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983). This case involves a statute which is capable of more than one interpretation. Petitioners argue that Nev. Rev. Stat. 209.241 requires interest to be credited to the collective fund as a whole. Respondent argues that Nev. Rev. Stat. 209.241 requires interest to be credited to his individual account. A definitive ruling by the state court on this issue would avoid the constitutional question because the court's ruling would determine whether the statutes creates a protected property interest for each inmate on the interest earned from the prisoners' personal property fund. Thus, . . .

this Court should abstain from deciding this issue.

Abstention is limited by considerations of delay and expense, however, the availability of certification greatly simplifies the analysis and its utilization. Bellotti, 428 U.S. at 150-151. Certification "'does of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism.'" Id. (quoting Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974)).

Nevada Rule of Appellate Procedure 5 permits the Nevada Supreme Court to answer questions of law certified to it by federal courts, "when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then

pending in the certifying court and as to which it appears to the certifying court there is not controlling precedent in the decisions of the supreme court of this state." Nev. R. App. P. 5.

5. There is No Constitutional Right of Inmates to Interest Earned on Inmate Trust Accounts.

The Due Process Clause of the Fourteenth Amendment provides that no State may "deprive any person of life, liberty, or property, without due process of law." The court must determine whether a due process violation has occurred by way of a two-step process. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1989). The threshold question is whether a constitutionally protected interest is implicated. Meachum v. Fano, 427 U.S. 215, 223-224 (1976); Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 843

(9th Cir. 1985); Williams v. Sumner, 648 F. Supp. 510, 511 (D.Nev. 1986).

> [T]o obtain a protectable right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'

Nev. Rev. Stat. 209.241 does not create any property interest in plaintiff receiving interest on his inmate account. There is no language within the statute which would lead an inmate to believe he should receive interest on his individual inmate account, since the statute clearly provides the interest is to be applied to the prisoners' fund.

The United States Supreme Court in Procunier v. Martinez, 416 U.S. 396, 412 (1974) stated,

> Suffice it to say that the problems with prisons in America are complex and intractable and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of

> which are peculiarly within the province of the legislative and executive branches of government. For all of these reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.

Id. at 404-405.

"Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). A federal court should not substitute its judgment for prison administrators "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." Pell v. Procunier, 417 U.S. 817, 827 (1974). Prison administration is a task that is committed to the responsibility of the

legislative and executive branches. Separation of powers concerns counsel a policy of judicial restraint. When a federal court is determining the constitutional validity of prison rules, regulations and/or practices of a state penal system, there is additional reason to accord deference to the appropriate prison authorities. Michenfelder v. Sumner, 860 F.2d 328, 331 (9th Cir. 1988).

Federal courts may not interfere with decisions made by state prison officials absent a constitutional violation. Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

The above standard applies even if an inmate's constitutional rights are impinged by a prison rule, regulation, or practice. The Supreme Court has repeatedly emphasized that, in determining the validity of regulations

impinging on the constitutional rights of inmates, courts are to accord great deference to prison officials' assessment of their interests. See e.g., Turner v. Safley, 482 U.S. 78, 84-85 (1987); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). This is due to the fact the realities of running a penal institution are complex and difficult and prison authorities are best equipped to make the intricate decisions regarding prison administration. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 126-128 (1977).

When a prison regulation impinges on *any* constitutional right of an inmate, it is valid if it is reasonably related to legitimate penological interests. Washington v. Harper, 494 U.S. 210 (1990); O'Lone v. Estate of Shabazz, 482 U.S. at 349; Turner, 482 U.S. at 95-96.

. . .

In Foster v. Hughes, 979 F.2d 130 (8th Cir. 1992), Inmates brought § 1983 action claiming that Missouri arbitrarily denied them the right to place their monies in private, interest-bearing accounts. The Department of Corrections kept individual accounts for each inmate and pooled all inmate funds for deposit in a non-interest bearing account. The Eighth Circuit held, inter alia, that providing the inmates' access to private accounts would seriously burden prison operation. Relying on Turner v. Safley, 482 U.S. 78 (1982), the court found that the regulation did not unconstitutionally infringe upon the rights of the inmates. The court in Foster based this decision not only on the burden it posed on the prison system, but also because the inmates had alternative methods of earning interest.

. . .

Similarly, under Nevada Department of Prisons' Administrative Regulation 259, inmates have the option to deposit, with the aid of an outside individual, their funds in outside bank accounts that bear interest. They are not required to deposit with the Nevada Department of Prisons.

The court in Hendrix v. Evans, 715 F. Supp. 897 (N.D.Ind. 1989), dealt with an Indiana law which also provides that all inmate funds are deposited into a trust fund. The court stated, "[i]nterest accrues on the funds deposited in trust, and it is the trust that has a legal right to the accrued interest, not the inmate." Hendrix, at 911. The court stated:

> In not denying that either plaintiff has funds deposited in a DOC trust account, the defendants cite three district court decisions in which the courts have found that the Constitution does not create a right to earn interest on personal funds while incarcerated. In X

> (Smith) v. Robinson, 456 F. Supp. 449 (E.D.Pa. 1978), the district court concluded that there is no right, under any aspect of the Due Process Clause, to earn interest on monies received while incarcerated. Id. at 454. In Bijeol v. Benson, 404 F. Supp. 595 (S.D.Ind. 1975), District Judge James E. Noland found that a federal prisoner has no constitutional right to draw interest on his commissary account. Id. at 599. Lastly, in Gray v. Lee, 486 F. Supp. 41 (D.Md. 1980), aff'd, 661 F.2d 921 (4th Cir. 1981), the district court concluded that refusal to pay interest on inmate funds did not deprive inmates of property without due process "[i]nasmuch as prisoners may transfer funds from their spending account to a 'free-world' interest bearing savings account...." Id. at 45.

Hendrix at 911.

Plaintiff does not have the right, under the Due Process Clause of the Constitution, to earn interest on his inmate account while incarcerated. Nev. Rev. Stat. 209.241 does not require that interest be credited to individual inmate accounts. Finally, the Nevada Legislature does not intend for interest to be credited to individual inmate

accounts. Plaintiff has not suffered a due process violation and the Ninth Circuit Court of Appeals erred in reversing the District Court.

CONCLUSION

It is clear in light of the syntax of "Prisoners' Personal Property Fund", legislative acquiescence as indicated by the history of the legislation, the fact that no unmistakable and clear language exists for an inmate to conclude he has a protected property interest, and the impact the decision would have on other inmates and the allocation of prison resources, the Ninth Circuit erred in finding that Nev. Rev. Stat. § 209.241 creates a protected property interest.

The result that will be achieved in the order by the Ninth Circuit is administrative unfeasibility, high cost and deprivation of resources for the inmates. It will cost much more to

implement the requirements of The Ninth Circuit's Court order than the cumulative financial advantage to the inmates.

For the reasons discussed above, the State respectfully requests this Court grant certiorari, receive briefs on the merits, and ultimately reverse the judgment of the Ninth Circuit court of Appeals.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LESTER TELLIS,	)	
	)	CV-S-90-799-LDG(LRL)
Plaintiff,	)	
v.	)	
	)	
S. GODINEZ, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter is before the court on plaintiff's motion for partial summary judgment (#11) and defendant's cross-motion for summary judgment (#12a).

1. Facts

In this 42 U.S.C. § 1983 civil rights action the plaintiff Lester Tellis, a Nevada state prisoner, contends that monies in his personal prison bank account are being withheld from him in violation of federal constitutional due process. Tellis also contends that he is being deprived of the interest earned on

the money in his account without the benefit of due process protections. Defendants, Nevada state prison officials, admit that Tellis has no present access to these funds and that the interest earned on them is not being paid back into his account. They maintain, however, that they have the authority under Nevada law to require prisoners with an eventual release date to maintain a two-hundred dollar ($200) minimum balance[1] in their personal prison account until the date of their release to cover the prisoners' post-release expenses, and to credit interest earned on prisoners' personal accounts to the prisoners' personal property fund generally, rather than to individual accounts.

---

[1]It is undisputed that the present balance of Tellis' account equals one-hundred sixty-three dollars and seventy-two cents ($163.72), below the minimum required by prison regulations.

2. The law

The Fourteenth Amendment to the United States Constitution prohibits a state government from depriving a person of life, liberty or property without due process of law, U.S. Const. amend XIV § 1. This right to due process only attaches when a person is deprived of an interest independently recognized as "protected" under state, federal or constitutional law, Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). In other words, the Due Process Clause itself does not confer any substantive rights, but rather provides procedural protection in the event that a person is deprived of an independent, substantive interest, Olim, 461 U.S. at 250, 103 S.Ct. at 1748 ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which an individual has a

legitimate claim of entitlement"). Also see, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Here the question is whether Tellis has a protected property or liberty interest in the funds in his prison account, or in the interest earned by those funds.

A. Tellis' property interest in the funds themselves

Clearly a prisoner has a protected property interest in the funds he/she maintains in a personal prison bank account, Quick v. Jones, 754 F.2d 1521, 1523 (9th Cir. 1985). This means that the state may not appropriate any amount of those funds, however small, for its own use or the use of others absent some sort of procedural mechanism which will satisfy the requirements of due process, Id. at 1524. However, in this case there is no allegation that the state has

withdrawn or threatened to withdraw any money from Tellis' account for its own use or the use of others without the requisite due process.

B. Tellis' property interest in the interest earned

Tellis does allege that the state is depositing the interest earned on his money into the prisoners' personal property fund generally, rather than into his own account. The defendants do not dispute this. Rather, they cite Nevada Revised Statutes § 209.241 as authority for this procedure. That statute provides, in pertinent part:

> 1. The director [of prisons] may accept money . . . belonging to an offender at the time of his incarceration or afterward received by gift, inheritance or the like or earned during the incarceration of an offender and shall deposit the money in the prisoners' personal property fund, which is hereby created as a trust fund.
>
> . . .
>
> 3. The interest and income earned on the money in the fund, after deducting

any applicable charges, must be credited to the fund.

The question presented here is whether the words "the fund" in sub-section 3 of this statute (which has not been interpreted by the Nevada courts) refer to a prisoner's individual account within the prisoners' personal property fund, or to the fund as a whole.

The court finds that the statute is ambiguous with respect to this issue. Sub-section 3 refers to "the fund" generally in the same way that "the fund," meaning the whole of the prisoners' personal property fund, is referred to in the rest of the statute. Thus, a literal reading of this language suggests that interest earned on prisoners' accounts be deposited into the fund generally, which is consistent with the defendants' present policy. As a general rule, language on the face of a statute which is unambiguous when read

according to its ordinary meaning should be construed according to that meaning in the courts, United States v. Locke, 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985).

However, a statute which is unambiguous on its face may be considered ambiguous if the plain meaning of that statute leads to a result not reasonably contemplated by the legislature, United States v. Mendoza, 565 F.2d 1285, rehearing 581 F.2d 89 (5th Cir. 1978). The question immediately arises upon review of NRS § 209.241(3) -- where does the interest earned by the prisoners' money ultimately go? Sub-section 1 of the statute explicitly provides that the "prisoners' personal property fund" be created as a trust fund. This puts the prisoners who have accounts in the fund in the position of beneficiaries of a trust and the state of Nevada in the

position of a fiduciary. Certainly, under conventional notions of fiduciary duties, it is not proper for a trustee to divert interest earned on trust funds to a use other than one which would benefit the beneficiary of the trust, see A. Scott & W. Fratcher, The Law of Trusts, 4th ed. § 207.1. Seen in this light, it may be that NRS § 209.241 could plausibly be read, and that the legislature intended, to provide that interest earned on a prisoner's own funds should be credited to that prisoner's personal account. This interpretation of the statute would support a prisoner's reasonable expectation that the interest earned on his money would be so allocated. Such a reasonable expectation may well qualify as a protected property right, see McGraw v. City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989) (state statute giving rise to reasonable

expectation of continued employment creates property interest in that employment to which due process applies).

Because 1) it is not clear from the record how the interest which "must be credited to the fund" pursuant to NRS § 209.241(3) is ultimately spent and 2) the issue of Tellis' reasonable expectation in the receipt of that interest has not been addressed by the parties, the court finds it in the interests of justice to allow the parties to re-brief those two issues.

C. Tellis' interest in the "use" of his funds

Plaintiff's main contention is that he is being deprived of the "use" of his funds without due process of law. However, it is not clear that prisoners have any protected interest in the use of the funds in their personal property accounts prior to their release (though

they would certainly have one at the time of their release). such an interest would either be a "property" or "liberty" interest under the Fourteenth Amendment.

Although the question of a prisoner's property or liberty interest in the use of funds in his/her prison bank account has not been heavily litigated in the courts of this or any other jurisdiction, what authority there is suggests that such an interest exists only if it is conferred by a state or federal statute. The Seventh Circuit Court of Appeals, facing a situation similar to that presently before this court, observed the following in dictum:

> It is beyond dispute that [the prisoner] has a property interest in the funds on deposit in his prison account. See, e.g., Quick v. Jones, 754 F.2d 1521 (9th Cir. 1985); Jensen v. Klecker, 648 F.2d 1179, 1183 (8th cir. 1981); Sell v. Parratt, 548 F.2d 753, 757 (8th Cir.), cert. denied, 434 U.S. 873, 98 S.Ct. 220, 54 L.Ed.2d 152 (1977). Yet, [the prisoner] does not argue, nor could he, that the government has caused him to forfeit these funds or to pay them over

to it. He complains, rather, that he may no longer use in a particular way property that is his. It is difficult to say whether [the prisoner's] claim, so characterized, implicates a property interest or a liberty interest. In any event, his due process claim must be supported by a protected interest in the use of his commissary account. Loudermill, ---- U.S. ----, 105 S.Ct. at 1491; Shango [v. Jurich, 681 F.2d [1091] at 1097 [(7th Cir. 1982)].

For the purposes of the Due Process Clause, property interests must be found in state or federal law. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972); Shango, 681 f.2d at 1097. Liberty interests, however, may originate in the Constitution as well. Hewitt v. Helm, 459 U.S. 460, 466, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983); Matthews v. Fairman, 779 F.2d 409, 472 (7th Cir. 1985); Shango, 681 F.2d at 1097. [The prisoner] does not point to, nor do we see, a liberty interest arising out of the Constitution itself to support his due process claim. Thus, whatever interest is implicated by Campbell's claim must be created by state or federal law. Because the analysis for property and liberty interests created by state or federal enactments is the same, Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); Shango, 681 F.2d at 1097, the ambiguity in [the prisoner's] argument as to whether he is asserting a property or a liberty interest in the use of his inmate account is inconsequential to the disposition of his claim. Since Campbell is a federal inmate, we confine our inquiry to federal law (here, federal

. . .

prison regulations) involving inmate commissary accounts.[2]

Although a protected interest may be created through the enactment of regulatory measures, see, e.g., Wolff, 478 U.S. at 557, 94 S.Ct. at 2975 (good-time credits); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979) (parole); Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (transfer to mental institution), the regulation must support a claim of entitlement to the benefit in question. We do not look to the weight or importance of that benefit to the individual, but rather the manner in which it was conferred. Greenholtz, 442 U.S. at 7, 99 S.Ct. at 2103; Jago v. Van Curen, 454 U.S. 14, 17, 102 S.Ct. 31, 34, 70 L.Ed.2d 13 (1981). Unless the regulation limits an official's discretion in denying the benefit to "objective and defined" criteria, no protected interest has been created. Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747, 75 L.Ed.2d 813 (1983) (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (Brennan, J., concurring); Hewitt, 459 U.S. at 471-72, 103 S.Ct. at 871; Mathews, 779 F.2d at 413; Achacoso-Sanchez v. INS, 779 F.2d 1260, 1264-65 (7th Cir 1985). Of course, once it is determined that a protected interest exists, it is no longer the prerogative of the promulgating agency to define the procedures to be followed in protecting that interest; that is a matter of constitutional law. Loudermill, ----

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[2]In the instant case Nevada state law and prison regulations are applicable.

U.S. at ----, 105 S.Ct. at 1487; Logan v. Zimmerman Brush Co., 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982); Vitek 445 U.S. at 491, 100 S.Ct. at 1263. Thus, if the federal prison regulations governing inmate discipline and the use of inmate accounts place substantive limits on the discretion of prison authorities, and hence, give [the prisoner] an entitlement to the use of his commissary account, then the impoundment deprived [the prisoner] of a protected interest,

Campbell v. Miller, 787 F.2d 217, 222-23 (7th Cir. 1986). The Seventh Circuit went on to find in Campbell that the requirements of due process had been met in that case, and thus that court did not address the question of whether federal law created an entitlement on behalf of the prisoner in that case to the use of the funds in his account. However, the discussion quoted above is instructive for purposes of this case, and this court finds it persuasive.

The Seventh Circuit stated unequivocally that a liberty or property right in a prison account fund must

derive from some source other than the United States Constitution. The analysis turns, then, on whether a prisoner can demonstrate any independent "entitlement" to the use of his/her funds in state or federal law. Here there is no suggestion that federal law is applicable. Therefore, Tellis' claim must be based on the state statute, NRS § 209.241. A fair reading of that statute indicates that the Director of Prisons has wide discretion over the release of a prisoner's funds kept in his/her personal prison account up until the time of that prisoner's release:

> 2. The director:
>
> (a) Shall keep, or cause to be kept, a full and accurate account of the money and valuables, and shall submit reports to the board relating to the money and valuables as may be required from time to time.
>
> (b) <u>May</u> permit withdrawals for immediate expenditure by an offender for personal needs.
>
> . . .

(c) Shall pay over to each offender upon his release any remaining balance in his individual account,

N.R.S. § 209.241(2) (emphasis added). Sub-section 2(b) clearly supports the defendants' claim that the Director has discretion over whether he will allow withdrawal of a prisoner's money for personal needs. Therefore, the statute does not create any entitlement on behalf of the inmates to withdraw funds at their own pleasure. It is well within the director's statutory discretion to impose a policy of requiring a two-hundred dollar ($200) minimum balance in prisoner's accounts to be used to cover an inmate's immediate post-release expenses, which he has done, see Nevada State Department of Prisons Administrative Regulation #258. This regulation is a proper exercise of the director's authority.

. . .

Finally, Tellis argues that he has no real potential for future release due to the severity of his sentence, although theoretically he may become eligible for parole sometime in the future.[3] If this is so, the above analysis is inapplicable, since the standard restriction on the use of a prisoner's personal property funds in such a circumstance would constitute a constructive taking of those funds. Indeed, the prison regulations themselves provide that the policy of requiring a two-hundred dollar ($200) minimum balance in prison accounts does not obtain in the case of prisoners incarcerated for life without the possibility of parole, for obvious reasons, see Administrative

---

[3]The record demonstrates that Tellis is serving two life terms with the possibility of parole and an additional 109 years, see defendant's exhibit # 1, motion for summary judgment (#11).

Directive #28-90.[4] Those prisoners who are never to be released need never cover any post-release expenses.

The director has determined that Tellis does not qualify for an exception to the minimum balance policy because he is not a prisoner without a release date. However, it is not clear that this assessment was based on consideration of the severity of Tellis' sentence. Since the court has decided to allow the parties to re-brief the issue of where the interest credited to the prisoner's personal property fund is ultimately allocated, it will be no inconvenience for the parties also to address the question of Tellis' practical potential for release in those supplemental briefs.

Accordingly, for the reasons above stated,

---

[4]Defendant's exhibit D, opposition to motion for partial summary judgment and cross-motion for summary judgment (#12).

IT IS ORDERED that the parties in this action re-brief the issues of 1) the final allocation of the interest earned on the prisoners' personal property fund, 2) plaintiff's expectation that the interest earned on his money would accrue to his own account and 3) plaintiff Tellis' practical potential for eventual release.

DATE: 29 January, 1991

SIGNED BY:
LLOYD D. GEORGE
United States
District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LESTER TELLIS,	) CV-S-90-799-LDG(LRL)
	)
Plaintiff,	)
	)
v.	)
	)
S. GODINEZ, et al.,	)
	)
Defendants	)
	)

JUDGMENT

IT IS HEREBY ORDERED that judgment be entered for the defendants in this action, pursuant to this court's order granting the defendants' cross-motion for summary judgment (#12).

DATE: 2 April, 1991

SIGNED BY:
LLOYD D. GEORGE
United States
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LESTER TELLIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CV-S-90-799-LDG(LRL)
	)	
S. GODINEZ, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

This matter comes before the court on Plaintiff's Motion for Additional Findings of Fact and to Amend Accordingly (#19) and also Plaintiff's Motion for Partial Summary Judgment (#20). The court has also considered Defendant's Opposition to Motion for Additional Findings of Fact (#21), and Plaintiff's Reply to that Opposition (#22).

I. BACKGROUND

Plaintiff, a Nevada state prisoner, brought this civil rights action against

the Defendants, Nevada state prison officials, contending that monies in his personal prison bank account and the interest thereon were being withheld from him in violation of federal constitutional due process. After consideration of the pleadings, this court ordered (#14) the parties in this action to re-brief certain issues which were unclear. After such re-briefing, this court ordered (#17) that Plaintiff's Motion for Partial Summary Judgment be denied and Defendant's Cross-Motion for Summary Judgment be granted. Judgment was then entered for the Defendants (#18). Plaintiff subsequently filed the Motions that are now before the court.

II. PLAINTIFF'S MOTION FOR ADDITIONAL FINDINGS OF FACT

Plaintiff makes this Motion for Additional Findings of Fact pursuant to Federal Rules of Civil Procedure, Rule

52(b), which states in pertinent part, "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly." Plaintiff's assertion in this Motion is the same as in his original complaint, that NRS 209.241(3) requires interest from the Prisoner's Personal Property Fund be placed back into each prisoner's individual account. This court has already ruled that the statute does not so require, and that the prison policy regarding that interest is reasonable and the Plaintiff could not have reasonably developed an expectation that the interest earned on his personal property account would be remitted to his personal account. Plaintiff's Motion merely attempts to reargue his original complaint, upon which this court has

already ruled. Further, Plaintiff makes no additional arguments that would warrant an additional finding of fact, and therefore this motion must be denied.

III. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ACCESS TO THE COURTS

Plaintiff's Motion for Partial Summary Judgment is innappropriate because Defendants' Motion for Summary Judgment has been granted in this case, and judgment has accordingly been entered for Defendants. It is elementary that summary judgment cannot be entered in an action that has already been fully adjudicated by this court. This motion must also be denied.

Hence, for the reasons above stated,

IT IS HEREBY ORDERED that Plaintiff's Motion for Additional Findings of Fact and to Amend Accordingly is DENIED.

. . .

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED.

DATE: 3 August, 1991

SIGNED BY:
LLOYD D. GEORGE
United States
District Judge

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESTER TELLIS, *Plaintiff-Appellant,* v. S. GODINEZ, et al., *Defendant-Appellee.*	No 91-16296 D.C. No. CV 90-799-LDG OPINION

Appeal from the United States
District Court
for the District of Nevada
Lloyd D. George, District Judge,
Presiding

Submitted November 6, 1992*
San Francisco, California

Filed September 28, 1993

Before: Alfred T. Goodwin, Jerome Farris, and
Harry Pregerson, Circuit Judges.

Opinion by Judge Pregerson;
Dissent by Judge Farris

*The panel unanimously found this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a judgment of the district court. The court held that the plain language of a state statute created a constitutionally protected property interest in the income and interest actually earned on money deposited in a prisoner's personal property fund.

Appellant Lester Tellis, a Nevada state prisoner, sued prison officials under 42 U.S.C. Section 1983, alleging violation of due process through the withholding of interest earned on funds deposited in his personal prison account. The officials contended that the prison director retained complete discretion to disburse such funds because the statute authorizing such accounts did not explicitly restrict that discretion. The

district court held that Tellis did not establish the existence of a protected property interest and gave summary judgment for the officials. Tellis appealed.

[1] The section of the statute making mandatory the deposit of interest and income earned on money in prisoners' personal property funds was silent as to the prison's authority to withhold such funds from those accounts under any circumstances, [2] whereas other sections of the same statute expressly authorized prison officials to expend other funds and the interest earned on them in specified ways and in specified circumstances. It had to be assumed that the legislature would have expressly authorized any intended expenditure of interest earned on prisoners' personal funds. [3] The statute as a whole created

a protected property interest in those funds and the prison's failure to credit them was a violation of Tellis's right to due process.

Judge Farris, dissenting, opined that the statute relied upon did not create a protected property interest in Tellis.

COUNSEL

Lester Tellis, Ely, Nevada, plaintiff-appellant in pro per.

George H. Taylor, Deputy Attorney General, Carson City, Nevada, for the defendants-appellees.

OPINION

PREGERSON, Circuit Judge:

Nevada state prisoner Lester Tellis appeals pro se from a district court order granting summary judgment in favor

of defendant prison officials. Tellis brought this action under 42 U.S.C. § 1983, alleging that prison authorities violated his due process rights by withholding interest earned on funds in his personal prison bank account.[1] We reverse.

BACKGROUND

Lester Tellis is a Nevada state prisoner serving two consecutive life terms with the possibility of parole and an additional consecutive term of 109 years. He currently has $163.72 on deposit in the Nevada "prisoners' personal property fund."

Tellis twice requested that prison officials credit his personal property

[1]Tellis also alleged that prison authorities refused to allow him to use his funds to hire an investigator, in violation of his right of access to the courts. We address this claim in a separate, unpublished memorandum disposition.

account with interest actually earned on those funds. Defendants refused, claiming that Nevada Revised Statute 209.241 grants the Director of Prisons authority to use interest earned on prisoners' personal accounts at the director's discretion.

Tellis then filed a pro se complaint under 42 U.S.C. § 1983 against various prison officials, alleging that officials violated his due process rights by failing to credit his account with interest earned on his funds. On cross-motions for summary judgment, the district court ruled that Tellis failed to establish a protected property interest in interest earned on his funds. Judgment was entered for defendants, and Tellis timely appealed.

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STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992). Summary judgment is appropriate if, after viewing the evidence in the light most favorable to the party opposing the motion, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (citing *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir. 1988)).

In this case, the evidentiary materials submitted by the parties on cross-motions for summary judgment raise no genuine issue of material fact. Therefore, we review the judgment of the court below to determine whether the undisputed facts entitled defendants to judgment as a matter of law.

DISCUSSION

The Fifth Amendment declares that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). That prohibition applies to the States through the Fourteenth Amendment. *Id.* It is undisputed that prison officials have not "compensated" Tellis for the use of the interest earned on his savings. The only question then, is whether the failure to credit interest actually earned on Tellis's savings to his account constitutes a "taking" within the meaning of the Fifth Amendment.

The due process guarantees of the Fifth and Fourteenth Amendments apply only when a constitutionally protected liberty or property interest is at stake.

Board of Regents v. Roth, 408 U.S. 564, 569 (1972); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Protected property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577.

Tellis contends that Nevada Revised Statute 209.241[2] ("Prisoners' Personal Property Fund") creates such a protected property interest. In relevant part, § 209.241 provides that:

> 1. The director may accept money, including the net amount of any wages earned during the incarceration of an offender after any deductions made by the director, and valuables belonging

[2]All references to statutory sections are to Nevada Revised Statutes.

> to an offender at the time of his incarceration or afterward received by gift, inheritance or the like, or earned during the incarceration of the offender and shall deposit the money in the prisoners' personal property fund, which is hereby created as a trust fund.
>
> . . .
>
> 3. The interest and income earned on the money in the fund, after deducting any applicable charges, *must be credited to the fund.*

§ 209.241 (emphasis added).

Specifically, Tellis argues that the mandatory language of subsection 3, requiring that interest be credited to the prisoners' fund, creates a protected property interest in such interest. In response, defendants contend that the director of the prisons retains complete discretion to disburse that interest

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because the statute contains no explicit restriction on that discretion.[3]

We conclude that Tellis's construction of § 209.241 is consistent with both the plain language of that section, and a reading of that section in the context of the entire statute.

[1] First, "a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village Inc.*, 112 S. Ct. 1011, 1015 (1992). Section § 209.241 makes mandatory the deposit of interest and income earned on money in the prisoners' personal property

[3]Defendants have been using interest earned on prisoner funds for prisoner recreation and law library expenses since 1981. They contend that annual audits gave the legislature constructive notice of this practice, and that the legislature's failure to overrule the practice constitutes tacit approval. However, appellees cite no authority to support such an approach to statutory construction.

fund. It makes no mention of authority to withdraw such interest and income under any circumstances. The requirement to credit interest and income earned to that fund would be meaningless in practical effect if we construe the section to authorize the director to spend that money at his discretion.

Second, the "statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citations omitted) (refusing to imply a limitation on one section of a statute where other sections expressly incorporated such limits).

[2] Other sections of Chapter 209 of the Nevada Revised Statutes expressly authorize prison officials to expend the funds and interest earned on those funds

under certain enumerated circumstances. For example, § 209.221 requires that money received from certain sources be deposited in an "offenders' store fund." § 209.221(1). Money deposited in that fund "must be expended for the welfare and benefit of all offenders." § 209.221(3). Interest and income earned on the offenders' store fund "must be credited to the fund and may only be disbursed as authorized by the legislature." § 209.225. *See also* § 209.383(3) (revenue earned on the sale of blood by prisoners, along with interest and income earned on that money, must be deposited in a fund for destitute prisoners; money may only be withdrawn by the director to pay stipends to destitute offenders); § 209.231 (money received from operation of a conservation camp to be deposited in a "forestry account" and

that money may only be expended for enumerated forestry-related purposes). Thus, we must assume that the legislature would have expressly authorized expenditure of money earned on prisoners' personal funds if it intended to do so.

[3] The plain language of this section, read in the context of the entire statute, does create a protected property interest in interest and income actually earned on money deposited in the prisoners' personal property fund. As such, the director's failure to credit Tellis's account with interest earned on his funds violates Tellis's due process rights. *See Webb's*, 449 U.S. at 164 ("The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.").

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CONCLUSION

We reverse and remand this matter to the district court for entry of judgment in favor of Tellis on this claim.

REVERSED.

FARRIS, Circuit Judge, dissenting:

I would welcome a constitutional right to interest, as would others in the marketplace, but there is none.

Our case law makes it clear that "the plaintiff must show that a protected property interest was taken." *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 956 (9th Cir. 1991). Tellis has not and can not meet this burden. He relies on Nevada Revised Statutes, § 209.241 (1989), which states that the "interest and income earned ... must be credited to the [prisoners'] fund." Tellis can not claim that he had a reasonable

expectation of receiving a slice of the fund interest when, since 1981, the interest has been used to support prison law libraries and to purchase recreational equipment for the inmates. I respectfully dissent.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LESTER TELLIS,	)	No. 91-16296
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV 90-799-LDG
v.	)	(Nevada)
	)	
S. GODINEZ, et al.	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: GOODWIN, FARRIS, and PREGERSON, Circuit Judges.

Judges Goodwin and Pregerson have voted to deny appellees' petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing en banc and Judge Goodwin recommends rejection. Judge Farris would grant the petition for rehearing but reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on

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whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.